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FEDERAL COMMUNICATIONS COMMISSION
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March 4, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: <u>CC Docket No. 95-185</u>

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Bell Atlantic NYNEX Mobile, Inc., are an original and four copies of its "Comments" on the "Notice of Proposed Rulemaking" and "Supplemental Notice of Proposed Rulemaking" in CC Docket No. 95-185, <u>Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers</u>.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

cc: ITS, Inc.

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Before The
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)))	CC Docket No. 95-185

COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

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Dated: March 4, 1996

TABLE OF CONTENTS

		Page
I.	SUMMARY AND RECOMMENDATIONS	1
II.	THE NPRM CORRECTLY FOUND THAT CURRENT LEC-CMRS INTERCONNECTION SHOULD BE REFORMED	4
III.	THE NPRM'S PROPOSALS HAVE BEEN OVERTAKEN BY THE NEW ACT	7
IV.	THE COMMISSION SHOULD ADOPT AN ORDER THAT APPLIES THE NEW ACT TO LEC-CMRS INTERCONNECTION	8
	A. LECs Must Immediately Negotiate in Good Faith	9
	B. CMRS Carriers Are Entitled to Non-Discriminatory Rates	11
	C. LECs May Recover Only Actual Costs, Net of Subsidies	12
	D. Symmetrical LEC-CMRS Rates Are Acceptable	14
	E. Interconnection Arrangements Should Be Publicly Available But Not Tariffed	16
	F. The Commission Can Revisit the NPRM's Proposals Should The New Interconnection Model Prove Inadequate	17
V.	STATES SHOULD BE BARRED FROM IMPOSING CONDITIONS ON CMRS CARRIERS IN REVIEWING CMRS-LEC ARRANGEMENTS	19
VI.	CONCLUSION	23

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COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

Bell Atlantic NYNEX Mobile, Inc. (BANM),[1] by its attorneys, hereby submits its comments on the Commission's Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking in this proceeding.[2]

I. SUMMARY AND RECOMMENDATIONS

The Commission's NPRM is clearly right in its tentative conclusion that current interconnection arrangements between local exchange carriers (LECs) and commercial mobile radio service (CMRS) providers must be reformed. LEC-CMRS

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[1]Bell Atlantic NYNEX Mobile, Inc. is the managing general partner of Cellco Partnership, which holds or controls cellular radiotelephone licenses to provide service to more than 80 cellular markets throughout the United States.

[2]Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking ("NPRM") (FCC 95-505, released January 11, 1996); Supplemental Notice of Proposed Rulemaking ("Supplemental NPRM") (FCC 96-61, released February 16, 1996).

arrangements are marked by one-way compensation, discriminatory rates which force CMRS providers to pay more than other connecting carriers, and unwarranted state intervention. These inequities are obvious in light of the interconnection regime created by the new Telecommunications Act,[3] and they plainly must be revised.

BANM cannot agree, however, that the NPRM's solution to the problem, which would supplant negotiation with government-imposed compensation requirements, is the right answer. The new law, coming after the NPRM, addresses the Commission's concerns by creating what Congress called "a new model of interconnection."[4] The new process relies on carrier negotiation, backed by a set of mandatory baseline requirements LECs must meet, and enforced by state commissions, the FCC and the courts. Before the negotiation process is complete or reaches impasse, it is premature for government to impose a result.

Therefore, the Commission's goals in the NPRM and Congress' goals in the 1996 Act will be most promptly achieved if the Commission immediately concludes this proceeding by issuing an Order which takes three actions:

First, the Commission should immediately incorporate verbatim into its rules the interconnection and compensation requirements of Sections 251 and 252 of the new law. It should not defer action for the months that will be involved in

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[3]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[4]House Conference Report on S. 652, Rep. No. 104-458, 104th Cong., 2d Sess. (January 31, 1996) ("Conference Report"), at 121.

conducting the new "generic" interconnection proceeding, which will encompass many issues beyond this docket's scope. Instead, prompt action in this docket will confirm that CMRS carriers have immediately enforceable rights, start running the law's timetables for achieving those rights, and dispel any uncertainty as to whether the interconnection provisions of the 1996 Act are self-executing.

Second, the Commission should dispose of issues raised by the NPRM by interpreting the new statutory regime with reference to LEC-CMRS compensation. The 1996 Act's "new model of interconnection" requires (1) good-faith negotiation coupled with specific indicia of what constitutes good faith, (2) non-discriminatory treatment of CMRS carriers on such matters as price, mutuality, and access to network facilities, (3) cost-based (or cost surrogate-based) mutual and reciprocal compensation as the baseline, and (4) publicly available interconnection agreements in lieu of tariffs. The new law moots the NPRM's consideration of specific, government-mandated compensation rates as well as its proposal for distinct "interim" and permanent rules. But the Commission has the authority and responsibility to interpret the new law's requirements to give force to them, and should do so in this proceeding.

Third, the Commission should preempt states from imposing additional requirements on CMRS providers as a condition to approving interconnection agreements. Several states have imposed discriminatory interconnection rates on CMRS providers, or have refused to allow CMRS providers to receive any compensation at all, unless they submit to state "certification" and other regulation as local exchange carriers. These requirements, if not illegal under prior law, are clearly unlawful under the 1996 Act. The Commission should act to prevent state agencies from disrupting the goals of Congress.

II. THE NPRM CORRECTLY FOUND THAT CURRENT LEC-CMRS INTERCONNECTION SHOULD BE REFORMED.

The Commission expressed concern as to the existence of several problems in the pricing of LEC-CMRS interconnection. BANM's experience as one of the nation's largest CMRS carriers, summarized below, confirms these problems exist. Moreover, compensation arrangements in the nineteen jurisdictions where BANM or its affiliates interconnect with LECs are at odds with the requirements of the new law.

1. Lack of Mutual Compensation. The NPRM (at ¶¶ 40-41) provides information pointing to the pervasiveness of one-sided LEC-CMRS compensation arrangements, and the new law requires "mutual and reciprocal compensation." Sections 251(b)(5); 252(d)(2). Exhibit A to these Comments demonstrates that in eighteen of the nineteen jurisdictions where BANM or its affiliates provide cellular service, BANM must pay the LEC usage charges to carry BANM-originated calls to LEC destinations, but receives no fee from the LEC, let alone a reciprocal one, to terminate LEC-originated calls on its own network.[5] Indeed in two states,

[5]These per-minute usage fees which LECs charge to terminate BANM-originated traffic are in addition to the non-traffic sensitive charges that BANM must pay for physical interconnection arrangements.

Massachusetts and Connecticut, BANM must not only pay the LEC to terminate BANM-originated traffic, but must also pay the LEC to receive calls made from the LEC's network to BANM's network. In only one of the nineteen jurisdictions (New York) does BANM receive any compensation for terminating LEC-originated calls on its own network. This imbalance meant that in 1995 alone, BANM paid out nearly $50 million in termination usage fees, but received scarcely more than $1 million from LECs.[6]

2. Discriminatory Rates. These unequal interconnection usage rates are exacerbated by the fact that they are often higher than the rates other carriers pay. In some states the rates paid by BANM to the connecting LEC to terminate calls originated on BANM's network is more than twice as high as the rates paid by competitive local exchange providers (CLECs) to the LECs. For example, in New York, BANM pays 2.59 cents per minute to terminate local traffic on a LEC network, while CLECs pay only 0.98 cents per minute. See Exhibit A. (CMRS termination rates usually relate to larger geographic areas than CLEC rates.) Moreover, BANM pays the same per-minute rate for all calls regardless of time of day, in contrast to CLECs, which pay the LEC rate at discounts of up to 70 percent for calls made during off peak calling periods. These disparities have no

[6]BANM's traffic data indicate that LECs receive from BANM and complete on their networks approximately five times the volume of traffic that BANM receives from the LECs and terminates on its own network. Even given this traffic flow imbalance of five to one, BANM would have received roughly an additional $10 million in 1995 alone under a fully mutual and reciprocal regime based on current LEC charges.

rational cost basis, since a LEC's costs to complete a call received from BANM should be no higher than its costs to complete calls received from other carriers.

3. Lack of Cost-Based Rates. The variations in Exhibit A make it apparent that CMRS-LEC interconnection rates are not set at the cost to provide the service. Average termination charges vary by more than a factor of four across the jurisdictions in which BANM operates, from a high of 6.41 cents per minute in Vermont to a low of 1.50 cents per minute in Delaware and the District of Columbia. In states such as Connecticut and New York, where BANM pays a higher rate than CLECs, BANM's rates obviously include non-cost considerations. Given that BANM also pays nearly double in Massachusetts and Rhode Island what it pays in similar states like Delaware and New Jersey, it seems apparent that the wide variations in rates are not reflections of underlying cost differences.

4. State Intervention. BANM has been subjected to burdensome state proceedings to set interconnection rates. In Connecticut, the state commission refused to accept a mutual compensation plan which would have allowed BANM to receive revenue for terminating LEC-originated traffic on its networks. Instead the state commission barred the concept of mutuality altogether as applied to wireless carriers -- while directing adoption of a symmetrical regime for LEC-CLEC interconnection.[7]

[7]As detailed in Part V of these Comments, Connecticut's regime is unlawful under both Section 332 of the Communications Act and new Sections 251 and 252, and the Commission should so declare in its Order in this proceeding.

III. THE NPRM'S PROPOSALS HAVE BEEN OVERTAKEN BY THE NEW ACT.

The NPRM (at ¶ 59) proposes to address these problems by adopting an "interim" requirement that would impose "bill and keep" on all CMRS-LEC interconnection arrangements, in which neither carrier would receive compensation for terminating the other carrier's traffic, followed at some point by one of several government-imposed cost-based compensation regimes.

These proposals have been overtaken by the 1996 Act.[8] Congress has now enacted a detailed new interconnection regime which provides rights and protections to all CMRS carriers and local carriers such as CLECs that seek to exchange originating and terminating two-carrier traffic with LECs. The 1996 Act's "new model for interconnection"[9] set forth in Sections 251 and 252 creates substantive LEC interconnection obligations which address the terms and rates under which LECs are to offer interconnection. It also establishes a comprehensive process to give force to these interconnection goals. The starting point is voluntary negotiation between LECs and CMRS connecting carriers, with state, FCC and/or federal court involvement if negotiation is unsuccessful. Congress decided that carriers should be allowed to negotiate mutually beneficial arrangements free of government intervention, as long as LECs comply with the

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[8]The Commission's Supplemental NPRM in this proceeding sought comment "on the implications of the Telecommunications Act of 1996 on the Commission's proposals" as set forth in the NPRM. Supplemental NPRM at 2.

[9]Conference Report at 121.

substantive interconnection standards. Any CMRS carrier who is not satisfied by the results of the voluntary negotiation has an array of remedies under Section 252 and other sections of the law to enforce its mutual compensation rights.

While the NPRM is right in identifying the problem, its solution is not in sync with the 1996 Act, because it would substitute government-imposed specific compensation rules for carrier negotiation without permitting that negotiation process to work. The Commission must address compensation in a way that is consistent with the new statute.

IV. THE COMMISSION SHOULD ADOPT AN ORDER THAT APPLIES THE NEW ACT TO LEC-CMRS INTERCONNECTION.

The right approach is to conclude this proceeding immediately through an Order which (1) incorporates LECs' new interconnection obligations verbatim into Commission rules, (2) interprets those obligations and applies them to LEC-CMRS arrangements to address the NPRM's concerns, and (3) precludes the states from imposing additional conditions on CMRS providers as the price for approving otherwise lawful interconnection arrangements. This solution will enable the Commission to address the concerns raised by the NPRM, provide guidance to LECs and CMRS carriers as they negotiate mutual compensation agreements, and also guide the state commissions which will review those agreements.

A. <u>LECs Must Immediately Negotiate in Good Faith</u>.

The 1996 Act, for the first time, imposes on LECs a specific statutory "duty to negotiate in good faith" the terms and conditions of interconnection agreements. Section 251(c)(1). A LEC must respond to a request from a CMRS carrier to interconnect, and must then work toward an agreement that complies with the substantive interconnection requirements of the new law on mutual compensation and other terms.[10]

The Commission should immediately incorporate verbatim this duty of good faith into a new rule governing LEC-CMRS interconnection. No prolonged rulemaking is needed. The Commission has already determined that certain

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[10]BANM is aware that some parties to this proceeding have suggested that Sections 251 and 252 are not applicable to CMRS providers. BANM disagrees. There can be no doubt, given the language of those sections, that Congress intended to apply their protections to CMRS and local carriers, including CLECs, which seek to exchange their traffic with LECs. Section 252(a) requires a LEC to negotiate interconnection with a "requesting telecommunications carrier." Section 3(a)(49) defines a "telecommunications carrier" as "any provider of telecommunications services," and Section 3(a)(51) defines "telecommunications service" to include "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." This would clearly encompass CMRS providers.

Sections 251 and 252 build on Section 201(a) of the 1934 Act, which imposes a general obligation on carriers to interconnect. They also build on Section 332(c), enacted in 1993, which grants CMRS providers a right to interconnect with LECs but does not spell out terms for such interconnection or grant specific procedural rights. Sections 201(a) and 332 are surely sources of Commission authority, but reading these sections as the <u>sole</u> source of CMRS interconnection rights would not only be wrong as a matter of statutory construction; it would also undermine the 1996 Act's purpose of ensuring that LECs offer interconnection consistent with the new statutory standards.

provisions of the 1996 Act can be implemented by Order, without the need for notice and comment rulemaking.[11] It should do the same for the good faith duty to negotiate.[12] This action will make clear that LECs are immediately subject to the good faith duty to negotiate. Congress recognized the importance of setting specific time frames for the negotiation and the state commission review process to conclude, so that carriers can promptly seek relief from the failure of the negotiation process, Section 252(b), or the failure of a state commission to act, Section 252(e). Incorporation of the good faith obligations into a rule will ensure the process begins right away.

Prompt adoption of rules will also eliminate any ambiguity as to whether the Act's interconnection requirements are immediately enforceable, or must await FCC rulemaking action. This ambiguity is caused by Congress' direction to the Commission to adopt regulations to "implement" the interconnection provisions of Sections 251 within six months of the date of enactment. Section 251(d)(1). This suggests that the interconnection obligations may not be self-executing.[13] Any

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[11]For example, the Commission intends to issue an Order in March to implement Section 202 of the new law, which specifies requirements for cross-ownership of radio broadcast stations, without a rulemaking. Draft FCC Implementation Schedule for S. 652, released February 9, 1996, at 19.

[12]The courts have approved agencies' determinations to adopt regulations which quote or paraphrase statutory provisions without notice and comment rulemaking. E.g., Gray Panthers Advocacy Committee v. Sullivan, 936 F.2d 1284, 1290-92 (D.C.Cir. 1991); Komjathy v. National Transportation Safety Board, 832 F.2d 1294, 1296-97 (D.C.Cir. 1987), cert. denied, 486 U.S. 1057 (1988).

[13]See Levesque v. Block, 723 F.2d 175, 186-87 (D.C.Cir. 1983) (amendments to statute were not self-executing on the law's "effective date," but required "implementation" through regulations to be adopted by Secretary of Agriculture).

uncertainty on this issue, aside from risking the delay of litigation, would disserve Congress' goal of rapidly implementing the new interconnection system.[14]

B. CMRS Carriers Are Entitled to Non-Discriminatory Rates.

The NPRM noted that some CMRS carriers may be paying higher rates to LECs for interconnection than other carriers pay. As discussed above, BANM's experience confirms that such discriminatory compensation arrangements exist. In several states, BANM pays rates well in excess of the rates paid by competitive access providers, even though there is no apparent cost-based justification for the disparity. (See infra at 4-6 and Exhibit A.)

The NPRM (at ¶ 82) sought comment on whether CMRS carriers should be entitled to "most favored nation" status or other protections that would ensure that they pay traffic termination rates no higher than rates paid by other carriers. There is no need, however, for the Commission to craft additional rules, because the 1996 Act expressly requires that LECs offer non-discriminatory interconnection rates. See, e.g., Section 252(e)(2)(A). A LEC cannot charge a higher rate for

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But see United States v. Shaffer, 789 F.2d 682, 686 (9th Cir. 1986) (absent an express provision in the statute to the contrary, statute takes effect on date of enactment).

[14]Certain aspects of Sections 251 and 252 that are not germane to LEC-CMRS interconnection (e.g., dialing parity and numbering administration) can be addressed later in the "generic" interconnection proceeding the Commission has announced. But that docket is not scheduled to be initiated until April, with a decision in August, six months from now. There is no reason to prolong this LEC-CMRS interconnection proceeding to await the development of new rules in that docket which will address different issues from those involved here.

a CMRS carrier than it charges for other connecting carriers for two-carrier traffic, unless the LEC demonstrates that its costs are in fact higher for terminating the CMRS carriers' traffic.

To preclude any uncertainty, however, as to whether CMRS providers are entitled to such non-discrimination in the rates they pay, the Commission should take the following actions in its Order in this proceeding: (1) Declare that a CMRS carrier cannot be required to pay rates that are higher than the rates paid by any other interconnecting carrier for having its traffic terminated by the same interconnection method. (2) Declare that a LEC must offer those other rates to the CMRS provider in response to the CMRS provider's request for negotiation of an interconnection agreement.

C. LECs May Recover Only Actual Costs, Net of Subsidies.

The 1996 Act adopts specific "pricing standards" which include "charges for transport and termination of traffic." Section 252(d)(2). That provision adopts the principle that each carrier is entitled to recover its costs for terminating the other carrier's traffic. Section 252(d)(2)(A) states that, in determining whether a LEC has met its obligation under Section 251(b)(5) to enter into a reciprocal compensation arrangement, the reviewing State commission:

> shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -- (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier;

> and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Congress thus firmly linked a carrier's entitlement to compensation to its costs.[15] But as the NPRM (at ¶¶ 47-51) acknowledges, calculating a carrier's "true" costs is difficult. A method that seeks to determine costs precisely is also burdened with difficult accounting and methodology issues. Congress solved this dilemma of balancing cost determinations against the need for expedition and ease in setting rates, by allowing carriers the opportunity to agree on their respective costs and thus their interconnection rates. It prohibited states from rejecting agreements as long as they were based on a "reasonable approximation of the additional costs of terminating such calls," and also barred states from engaging in

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[15]The new law is ambiguous on whether "bill and keep" arrangements can be imposed if carriers cannot agree on mutual compensation. Section 252(d)(2)(B) provides that Section 252(d)(2)(A), quoted above, "shall not be construed -- (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and keep arrangements) . . . ." Thus, if connecting carriers <u>agree</u> to bill and keep, a state cannot <u>preclude</u> them from adopting it in lieu of compensation. This section does not, however, explicitly authorize either the Commission or the states to impose bill and keep over the objection of a carrier.

While the Commission may have authority to adopt bill and keep rules for LEC-CMRS interconnection, it should not assert that authority at present, but should first allow time for Congress's voluntary system of intercarrier negotiations to develop. Imposing bill and keep now would interfere with that system without having the record basis to do so, since there is no ground to conclude that the new statutory regime will not succeed. Mandating bill and keep would also be likely to provoke legal challenges by LECs on the basis that they were being unlawfully denied compensation for costs. Litigation would only delay achieving mutually beneficial arrangements in place of the current unsatisfactory situation.

burdensome and expensive ratemaking proceedings to establish costs "with particularity." Sections 252(d)(2)(A)(ii); 252(d)(2)(B)(ii).[16]

It is nonetheless clear that costs must bear at least a "reasonable approximation" to a carrier's actual costs, net of subsidies. The NPRM (at ¶ 54) noted the concern that LECs not shift into their cost base, through cross-subsidies, costs that do not relate to terminating a CMRS provider's traffic. This concern was incorporated in the new law, for Congress did not authorize LECs to recover more than their costs, based upon "a reasonable approximation of the additional costs of terminating such calls." Section 252(d)(2)(A)(ii). The Commission should declare in its Order in this proceeding that a LEC must back out of its costs, submitted to a CMRS provider as part of the negotiation process, all costs that cannot be attributed to termination of CMRS-originated traffic. Again, the 1996 Act makes available several remedies to a CMRS carrier should it believe that the LEC is not identifying its actual costs.

D. Symmetrical LEC-CMRS Rates Are Acceptable.

The NPRM "tentatively conclude[s] that LEC-CMRS interconnection rates should be symmetrical -- that is, LECs should pay CMRS providers the same rates

[16]The Commission should thus not select the "long-run incremental cost" method, the "Ramsey Rule," the "efficient component pricing rule," or one of the other methods for determining costs (NPRM at¶¶ 47-55), and impose it on carriers. Carriers are entitled to pursue a mutually agreeable cost arrangement. There are ample remedies available for CMRS carriers to invoke against LECs which do not cooperate in meeting their duty to negotiate in good faith.

as CMRS providers pay LECs." (NPRM at ¶ 78.) This conclusion was based on the Commission's belief that symmetrical compensation had numerous benefits: It ensures that LEC charges are tied to LEC costs, it obviates the need for the connecting carrier to demonstrate its own costs and is thus easier to derive and manage than asymmetrical rates based on carriers' costs, and it "could reduce LECs' ability to use their bargaining strength to negotiate an excessively high termination charge that LECs pay CMRS providers would pay LECs and an excessively low termination rate that LECs pay CMRS providers." (Id. at ¶ 80.)

BANM agrees with the NPRM's tentative conclusions on symmetrical rates. The 1996 Act does not undermine these conclusions; in fact it supports this even-handed approach as a model for "reciprocal" compensation. Congress' mandate that carriers could employ a "reasonable approximation" of their costs (Section 252(d)(2)(A)(ii)) authorizes the Commission and the states to rely on "cost surrogates" in lieu of calculating actual costs. The Commission should thus declare that symmetrical compensation agreements comply with the reciprocal compensation obligations of Section 251. A CMRS provider should be able to use the LEC's costs as its own costs and thus be entitled to receive symmetrical compensation. Carriers are free to agree on a different cost structure. It may be the case, for example, given the traffic volumes handled by each, that a CMRS provider's costs to handle LEC-originated traffic may exceed the LEC's costs in adding the incremental CMRS traffic to its network. If, however, they do not set a rate differential, the presumption should be that rates should be symmetrical.

The New York Public Service Commission recently concluded a detailed review of LEC interconnection requirements in which it considered the benefits and disadvantages of various types of compensation schemes. It concluded that symmetrical compensation should be adopted as the model, finding that it best achieved the New York Commission's goals of promoting interconnection and competition. Connecting carriers are entitled to the same rate to terminate LEC-originated traffic that the LEC receives to terminate the other carriers' traffic.[17] This Commission should also endorse symmetrical rates as "reciprocal" compensation which complies with Section 251(b)(5).

E. Interconnection Arrangements Should Be Publicly Available But Not Tariffed.

The NPRM requested comment on whether LECs should be required to file tariffs specifying their interconnection offerings. (NPRM at ¶ 88-95.) BANM recommends that the Commission require all LEC interconnection arrangements to be made publicly available. It should not, however, require LECs to prepare and file tariffs.

First, the 1996 Act does not compel LECs to tariff their rates for terminating traffic. To the contrary, it not only permits but directs that arrangements be reached wherever possible through bilateral contracts. Incorporating that

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[17]State of New York Public Service Commission, Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation, Case 94-C-0095, September 27, 1995; see also Staff Report in Module 2 Case 94-C-0095 - The Telecommunications Competition II Proceeding, February 15, 1995.

directive through a public availability requirement rather than through tariffing would thus be consistent with the new law.

Second, bilateral negotiations offer the best opportunity for each party to achieve the specific arrangements most suitable to its business needs and plans. The benefits of tariffing the NPRM (at ¶ 90) identifies -- preventing LECs from hindering development of competition and ensuring that carriers with market power do not impose unreasonable terms or discriminate -- can also be achieved if all contracts are available for other carriers to examine.

Third, the record in this and other Commission proceedings provides ample evidence that tariffing is at best costly and burdensome, and at worst discourages flexibility and innovation in establishing arrangements. The Commission has found that "tariffing imposes administrative costs and can themselves be a barrier to competition."[18] It has already forborne from imposing tariffing requirements on CMRS providers, and has steadily reduced its tariffing requirements for wireline carriers. Imposing tariffing of interconnection agreements would be a step backward and inconsistent with the Commission's actions in other proceedings.

F. The Commission Can Revisit the NPRM's Proposals Should the New Interconnection Model Prove Inadequate.

Adopting the new statutory interconnection and compensation provisions into its rules, and interpreting those provisions as outlined above, is all that the

[18] Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1479 (1994).

Commission need do for the present. To go further, and impose either "bill and keep" or a specific compensation scheme on all LEC-CMRS arrangements, is neither consistent with Sections 251 and 252 nor advisable. While the NPRM identified the need for reform, Congress has itself set out a comprehensive plan designed to achieve that reform. The Commission should give that model time to work. Every CMRS provider now has an array of rights that it can enforce through negotiation. If negotiation fails, it can force the LEC to arbitrate. In either case, the state commission is required to ensure Congress's standards are met. If the state commission fails to do its job, Commission or judicial relief is available.

The Commission has much to do to implement the other provisions of the 1996 Act. It should not devote scarce resources to developing government-imposed compensation schemes, particularly given Congress's approach in Sections 251 and 252. The NPRM has acknowledged the severe difficulties in selecting among those schemes. In addition, mandating specific compensation arrangements raises, as the Commission is well aware, extremely complex legal issues of federal vs. state jurisdiction and preemption. Given these practical problems and legal uncertainties, the Commission should at this point take only the actions outlined above.

The Commission, as the agency primarily charged with implementing Congress' mandates, possesses the inherent authority to intervene more deeply into the interconnection process, if circumstances later warrant. It may find that the new statutory model is not producing the benefits Congress sought, and that the procedural mechanisms are not working. At that time, the Commission should invoke its authority under Sections 201 and 332 of the Communications Act, as well as under Sections 251 and 252, to intervene in LEC-CMRS arrangements to impose requirements that it determines are necessary to serve the public interest.

V. STATES SHOULD BE BARRED FROM IMPOSING CONDITIONS ON CMRS CARRIERS IN REVIEWING CMRS-LEC AGREEMENTS.

Congress has given state regulatory commissions a role in reviewing interconnection agreements among telecommunications carriers, but has also circumscribed that role. State commissions may only reject an agreement on specific grounds. Section 252(e)(2). Their review of compensation agreements as to charges for transport and termination of traffic is even further limited. Section 252(d)(2)(B) precludes state rejection of an agreement that contains a "reasonable approximation" of the costs for those charges, or that employs a "bill and keep" system which waives charges altogether. These provisions are consistent with Congress' overall objective of placing primary reliance on the affected carriers to reach agreement, while retaining a limited oversight role for the states.

The new federal regime clearly does not authorize a state commission to exact from CMRS carriers certain commitments as the price for approving mutual compensation arrangements or for enabling CMRS carriers to obtain interconnection on the same terms available to other carriers. Yet that is what several state commissions have done. The Commission should, in its Order concluding this proceeding, preempt such state intrusion.

In March 1995, the Southern New England Telephone Company (SNET) submitted to the Connecticut Department of Public Utility Control (DPUC) a mutual compensation plan which would allow wireless carriers to be paid by SNET for traffic terminated on the wireless carriers' networks. The plan would also have required SNET to charge the wireless carriers the same rates it charged competitive wireline local exchange carriers (CLECs) to terminate traffic on SNET's network.

The DPUC rejected the agreement, not because it found the rates to be improper, but because it decided not to permit the wireless carriers to obtain any compensation.[19] It ruled that these carriers were not "eligible" for compensation because they had not "qualified" as CLECs. Thus BANM could not receive any compensation unless it applied to become a competitive local exchange carrier, was "certificated" for entry into the market as a CLEC, and complied with numerous regulations applicable to CLECs. As the DPUC put it:

> Without the corresponding ability to impose local service obligations and responsibilities on wireless carriers, the Department will not authorize SNET to enter into mutual compensation agreements with such carriers. . . . A wireless carrier may, however, seek certification as a CLEC in Connecticut. By obtaining a certificate of public convenience and necessity, a wireless carrier would simultaneously be subject to the responsibilities and obligations imposed on all CLECs in Connecticut and eligible for mutual compensation.[20]

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[19]DPUC Investigation Into Wireless Mutual Compensation Plans, Docket No. 95-04-04, Decision, September 22, 1995.

[20]DPUC Decision at 15.

The DPUC's action clearly violated Section 332(c)(3) of the Communications Act by subjecting BANM, a CMRS provider, to state entry and rate regulation as the price for obtaining mutual compensation. Section 332(c)(3) explicitly bars states from requiring CMRS carriers to obtain certification. Having been preempted from directly regulating CMRS carriers, the DPUC sought to regulate them through the back door, by holding their right to mutual compensation hostage unless they submitted to certification.[21]

The DPUC's action is equally unlawful under the 1996 Act, for it constitutes a denial of a LEC-CMRS mutual compensation plan on grounds other than those permitted by the new Act. See, e.g., Section 252(d). As of today, however, BANM continues to be prevented from securing reciprocal compensation from SNET (while being forced to pay compensation to that LEC).[22]

Other states have imposed, or are considering imposing, different mutual

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[21]It is not surprising that the DPUC's action denying cellular and other CMRS carriers mutual compensation was issued after this Commission had denied the DPUC's petition under Section 332(c)(3)(B) of the 1934 Act to continue its regime of regulating cellular carriers' wholesale rates, and less than three weeks after the Commission denied the DPUC's motion for a stay of the preemption order. Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, PR Docket No. 94-106, Report and Order, 10 FCC Rcd. 7025 (1995); Order, FCC 95-287 (released September 5, 1995).

[22]The DPUC's action against CMRS providers cannot be explained as a desire to protect LEC ratepayers from bearing additional costs. CLECs in Connecticut enjoy a reciprocal scheme under which they pay significantly less to the LEC to terminate their traffic than CMRS providers pay. Yet CMRS providers cannot qualify for this arrangement without submitting to state entry and rate regulation.

compensation rates on CMRS carriers and wireline carriers who seek to connect with the LEC. In New York, for example, BANM pays a rate of 2.59 cents a minute to the LEC, while CLECs pay only 0.98 cents. BANM is eligible for the CLEC's rate only if it applies for "certification" as a CLEC, thereby subjecting to entry and rate regulation. This scheme is unlawful on two counts: It violates the federal law's ban on state regulation of CMRS entry (Section 332(c)(3)) as well as its ban on discriminatory rates.

The Commission should, as part of its Order in this proceeding, explicitly declare these state schemes to be preempted by federal law. It should also declare that no state may impose such requirements as a condition of approving LEC-CMRS interconnection arrangements. In enacting Section 251, Congress nowhere limited, much less overturned, the preemption of state entry and rate regulation of CMRS which it had adopted only three years ago in Section 332. Allowing states to subject CMRS carriers to entry and rate regulation, as the price for approving interconnection or mutual compensation agreements, would nullify that federal law.[23]

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[23] In addition, several state commissions are considering adoption of mandatory compensation requirements, either alone or as part of broader competition proceedings. Such state-imposed arrangements would be at odds with the 1996 Act's reliance on voluntary carrier-to-carrier negotiation as a first step, and the FCC should, in its new LEC-CMRS rules, preclude them.